No. 12468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and wife,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF.

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The Brief of Appellee is divided into four parts, namely —(1) The Facts; (2) Argument; (3) Plaintiffs' Brief, and (4) Conclusion. This reply will examine the subject matter of each in the same order.

The Facts.

1. (The Lease.)

The defendant, United States, as the owner and landed proprietor of Yosemite National Park, empowered a private corporation under a lease to operate the facilities in the said Park at a profit.

Cerri, et al. v. United States, 80 Fed. Supp. 831.

"[5] Under the Tort Claims Act permitting recovery where United States if a 'private person' would be liable . . . *determines relationship of*

government to third parties, and gives consent to be treated by injured party as if it were a private individual amenable to court action without claim of immunity in all those cases not exempted by the Act, where negligence of agents, servants or employees has caused injury to a third party." (Italics ours.)

Article XII of the lease:

"It is further understood and agreed that the exercise of the privileges conferred by this contract shall be subject to the laws of Congress governing the park and the rules and regulations promulgated thereunder, *whether now in force or hereafter created or provided;".* (Italics ours.)

Article XIV of the lease:

"(b) In connection with said hotel and camping business and related facilities and conveniences, the company shall be entitled to occupy . . . all . . . located in said area . . . *and shall maintain and repair same* . . ." (Italics ours.)

Under (c) of the same article all such expenditures may be audited as business expenses or capital assets upon which profits are based.

Article VI of the lease:

"(j) That before the Secretary shall be bound by this agreement the company shall furnish a joint and several bond . . . necessary for the full protection of the Government, conditioned for the *faithful performance of this agreement* in all its particulars by the company." (Italics ours.)

Does the Appellee infer by the opening words of "Many years ago . . ." that the Tort Claims Act is not within the four corners of the lease? It is true that the said article declares, "Laws of Congress *governing the park* . . .", but the invitee has always had the right to file his case before the court of claims. The Tort Claims Act is the enlargement of the rights of a citizen being the abrogation of the "Kingly prerogative" of immunity and the installation of a more just and modern institution in its place. Upon the enactment of the Tort Claims Act, this procedural reform became a part of the laws governing the park, and the decision in the above case determined the relationship of the Government to the plaintiffs by reason of the principle enunciated clearly by the court in *McStay v. Citizens Bank,* 5 Cal. App. 2d 595.

> "The invitation to use the premises of another is inferred when there is a common interest, or mutual advantage.
>
> A license is inferred when the object is the mere pleasure or benefit of the person using them."

Therefore as there was a common interest, and a mutual advantage to the Lessor, to the Lessee and to the plaintiffs, the status of the plaintiffs is that of an invitee.

The plaintiffs give approval to the appellee's outline of the facts set forth in the first three pages of its brief with the following exceptions:

Appellee misquotes the testimony relating to the distance from the street light to the platform. (Subdivision 7, p. 3.) The testimony [R. 79] set the distance at 75 feet—not 50 feet.

There seems to be indecision on the part of Appellee as to the manner in which plaintiff Baeda Windsor descended from the platform to the paved parking area at which time she fractured the ends of the fibula of both ankles. In subdivision 8, page 3, Appellee declares that she *"stepped over the edge and fell to the ground."* In subdivision (2) of "Argument," page 5, Appellee has the plaintiff again *stepping over the edge of the platform.* Appellant acknowledges that she did intentionally step down to the concrete step and then down to the paved parking area. She had placed first the left foot and then the right at the lowest level at a place where she had a right to expect that the tread was suitable and safe. She was not injured on the step; but this is not the testimony of defendant's witness, Joseph I. McMullen. Appellee has quoted the true testimony of its said witness on page 9 of its brief, to-wit: ". . . *she suddenly fell while standing still* . . .", and reading the record, this is the only conclusion warranted by the testimony of the said witness. [R. 78.] Appellee seems to recognize that Baeda Windsor did not "tumble" down on the platform or the step, because there are undeniable facts that make any such conclusion untenable.

Do the facts indicate an unexpected fall or is there indication that Baeda Windsor was alert? A physician in a hospital maintained in the park by the defendants made no mention of any injuries other than the fractured ends of the fibula, and the said physician [R. 58-59], an agent of the defendants, remarked, ". . . never had two broken ankles . . . come in singles just like that, from ski jumpers . . ."

Argument.

This part of Appellee's brief seeks to establish that the construction of the gutter in front of the step was a "discretionary function" within the provisions of Title 28, Section 2680 of the Tort Claims Act. That to intentionally create a dangerous condition can be a "discretionary function."

Appellee cites the case of *Denny v. United States,* 171 F. 2d 365. The facts of this case are these:

Title 10, U. S. C. A., Sec. 96 provides:

> "The medical officers of the Army, 'whenever practicable,' shall attend the families of Army personnel free of charge, . . ." and Army regulation No. 40-505 is the same end.
>
> "[1-3] . . . It becomes manifest that the phrase *'whenever practicable'* . . . stamps the obligation . . . as discretionary in character." (Italics ours.)

What person or agency has the obligation and the authority to supervise construction in Yosemite Park? What person or agency may declare that the lessee, in permitting the edge of the platform to become "chewed up" [R. 46] thereby violated the provisions of the lease? What person or agency thus permitted a trap to be set for the plaintiff, Baeda E. Windsor? And may this person or agency, regardless of the duty that is conferred upon them, set up that these duties are "discretionary functions."

Title 16, U. S. C. A.:

> "Section 1. There is created in the Department of the Interior a service to be called The National Park Service . . . The Service . . . shall promote

and regulate the use of the Federal areas known as National Parks . . ."

(Under historical note at the end of the said section it will be noted that this service took over the office of National Parks, Buildings and Reservations March 2, 1934, a year before the lease herein was executed.)

The regional architect of the National Park Service, Mr. Cecil J. Doty, is at 180 Montgomery Street, San Francisco. [R. 30-31.] Under the aforesaid Article XII of the lease, the Building Code was a "regulation" duly promulgated.

Lem v. United States, 89 Fed. Supp. 915.

Dorothy Lem sued the United States of America under the Federal Tort Claims Act for personal injuries sustained as the result of stepping into a hole abutting the edge of a concrete gutter separating a sidewalk from a grass park strip in an area under the control of the *National Park Service.*

Findings of Fact by the Court (Lem Case.)

1. Plaintiff attended a concert at the Watergate open air auditorium given by a National orchestra. (It is presumed that it was a free attraction.)

2. At 10:30 P. M. plaintiff departed on foot and while walking—stepped off the sidewalk into the grassy park strip in order to go around some people.

5. In returning to the sidewalk—she stepped in a hole. The hole was about 6 to 12 inches wide and 12 to 18 inches deep, *and was not man-made.*

6. The sidewalk was 20 feet 6 inches wide and in good condition where plaintiff fell. There were three 1000 candle power lights on poles 18 feet high nearby with the nearest being about 50 feet away.

Conclusions of Law (Lem Case.)

(1) Plaintiff occupied the status of a licensee—she may not recover because defendant owed plaintiff no duty other than—not exposing her to hidden perils.

(2) One—could not recover—even if she was an invitee, in absence of showing that United States failed *to exercise reasonable care in maintenance and inspection of area where injury occurred.*

Appellant affirms that the case at bar involves the same principles as the *Lem* case except that the decision in the *Lem* case should be reversed in the *Windsor* case for the following reasons:

1. Plaintiffs were invitees.

2. That defendant was directly responsible for the existence of the dangerous condition. *The drain or gutter was man-made.* The regulations in the Building Code were violated as to lighting.

3. The lessor, under the lease, retained control of all structures in the park and upon the penalty of full indemnity, placed upon the lessee the obligation to maintain the premises and keep them in repair.

Plaintiff, Herbert Windsor, qualified as an architect and engineer. [R. 48.] In his testimony [R. 55-56] he points out the failure of the National Park Service *to exercise reasonable care in the maintenance and inspection of area where injury occurred.* This testimony was unchallenged.

There is no legal justification in the declaration in subdivision (5), page 6. There is no testimony and no other evidence that supports the declarations.

1. That a marked means of ingress and egress was provided for patrons of the lodge.

2. That Baeda Windsor was in the act of taking a "short cut."

The only markings were for pedestrians crossing the street,—a cross walk. From the parking area, at any point along the concrete step, the way of approach was the same. After you crossed the street, the physical features were identical. The concrete step was the same dimension as was the platform. And the gutter ran right along directly adjacent to the concrete step—right through the cross walk. Where were the marked means that indicated a safe means of ingress?

If Baeda Windsor took a short cut where was the beaten path?

There was a railing on the outer edge of the porch. [R. 77.] There were three openings in the railing for sets of steps to the platform. [Exhibit 1.] There were no markings, signs or notices guiding a patron as he left the cafeteria. In the dusk cars were visible in outline, but there was no way of noting a cross walk and even if it could have been seen would the conduct of an ordinary adult prompt him to descend at the cross walk and walk along behind the cars?

Assume for the moment that a backing car had knocked the plaintiff to the pavement. Would the defense be any less rational to say that the plaintiff should not have been in a spot where the hazards from vehicles were more self-evident and pronounced?

Plaintiffs' Brief.

The main attack by Appellee upon Plaintiffs' Brief is that there is a conflict in the probative evidence. That by reason of the principle that an appellate court will not disturb the judgment of the lower court where the said probative evidence is conflicting, the judgment in the case of *Windsor v. United States* should be affirmed.

Appellee cites:

Bellon v. Silver Gate Theatres, Inc., 4 Cal. 2d 1;

Cleo Syrup Co. v. Coca-Cola Company, 139 F. 2d 416.

The first case, a jury case, had several doubtful points. Each element, favorable to the plaintiff, was met by an almost equivalent unfavorable response.

In the second case the issue was one to be solved by the preponderance of evidence as to whether the name Cleo-Cola was an infringement of the name Coca-Cola.

In the case at bar where is there any conflict in the probative evidence? Where in the Appellee's brief is there any contrary or conflicting evidence upon the issues of proximate cause?

Aetna Life Ins. Co. v. Kepler, 116 F. 2d 1.

4. Courts.

"In non-jury case, trial courts fact findings, unsupported by substantial evidence, clearly against weight of evidence, or induced by erroneous view of law, not binding on Circuit Court of Appeals."

Home Indemnity Co. v. Standard Acc. Ins. Co., 167 F. 2d 919.

This case arose in the State of California.

In the opinion the Court of Appeals quotes from the case of *United States v. United States Gypsum Co.,* 68 S. Ct. 525:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies, or by a jury, this court may reverse findings of fact by a trial court where clearly erroneous . . . A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See also:

Davis v. Lane, 24 Cal. App. 2d 400.

Conclusion.

Appellee has set forth four questions *in order to determine the issue of liability.*

The plaintiff-appellant has the burden of proof of Nos. (1), (2) and (3). The defendant-appellee has the burden of proof of No. 4.

(1) Has the court jurisdiction to make any findings? This is answered affirmatively by the case of *Home Indemnity Co.*

(2) What was the proximate cause of the injury? A gutter, without any covering or grating, improperly lighted, *man-made in the concrete pavement adjacent to a riser from which people step down from an elevation.*

(3) Was it caused by an employee of the defendant acting within the scope of his employment? Under the *Lem* case the answer is yes.

(4) Was there contributory negligence? Under the rules of this principle of law established in the case of *Breaks v. Anderson,* 95 A. C. A. 802 cited in Appellants' Opening Brief, the Appellee has unequivocally failed to establish any negligence by the plaintiff Baeda Windsor, which proximately was the cause of her injury.

At the terminus of any writing a proponent of some notion, policy or principal may endeavor to drive home those points he deems most favorable to the cause that he seeks to sustain. On the other hand he may, by so doing, point out the fatal weakness in his argument.

On page 10 Appellee declares:

> ". . . that Baeda Windsor was caused to fall by her own carelessness, or by reason of some condition of the wooden platform or sidewalk, which was exclusively maintained by the . . . lessee.
>
> "The evidence shows that the accident was caused solely . . . etc.
>
> "We submit that in any event *the presence of a shallow depression or gutter . . . does not establish any negligence.*"

That which was the proximate cause of Plaintiff's injury could not be hidden by the many untenable positions that

Appellee has taken to sustain the judgment of the trial court.

The final line of Appellee's Brief sets forth a legal principle that is unknown to Appellant. There is as much logic in this statement, made by Appellee, as there is in the defense that the government should not be held liable for collision with a mail truck because the postoffice is operated at a pronounced deficit.

Respectfully submitted,

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